



Toxics Cleanup Program Policy

Policy 500B

Resource Contact: Policy and Technical Support Staff *Effective:* July 1, 1991
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Policy 500B Identification Of Potentially Liable Persons (PLPs)

This policy provides Ecology employees guidance on identifying potentially liable persons under the Model Toxics Control Act (MTCA).

The identification of Potentially Liable Persons (PLPs) is necessary to advance the cleanup of hazardous waste sites under MTCA and recover the costs and damages associated with the investigation and cleanup of these sites.

Users should also read Procedure 500B.

1. PLPs Shall Be Identified At Specific Times

PLPs must be identified when:

- A. Ecology has credible evidence that a release or threatened release of hazardous substances has occurred which poses a threat to human health and the environment; and,
- B. The Department is ready to proceed with action at a site (other than those listed in paragraph 2, below).

2. The Department Is Not Required To Conduct A PLP Search Under The Following Circumstances:

The Department may conduct emergency actions, initial investigations, site hazard assessments, WARM ranking, and listing decisions prior to determining the identity of or notifying PLPs.

3. PLPs Shall Be Identified Per Criteria In The MTCA

The standards of liability established in RCW 70.105D.040 state who may be potentially liable for a release or threatened release of hazardous substances. Ecology may name PLPs with respect to a site when persons meet any of the criteria of that section.

Liability is strict, joint, and several. Strict liability means that liability can be imposed on the basis of this statutory authority without any regard to who is at fault for a release. Joint and several liability means that any single PLP can be required to pay for all of the costs and damages associated with the investigations and cleanup of any release.

Ecology employees should utilize their best professional judgment in determining what credible evidence is, and in identifying persons potentially liable for a site. On complex sites, staff should consult with the Ecology Division of the Office of the Attorney General prior to sending preliminary PLP notification letters. See paragraph 13, below, for additional guidance on what is "credible evidence."

4. PLPs May Be Provided Exemptions From Liability In Some Cases

The Model Toxics Control Act, RCW 70.105D 040(3), provides persons some exemptions from liability. Ecology employees shall consider these exemptions prior to determining a person's potential liability under MTCA. If there is uncertainty about whether a person is exempt under this section, contact the Ecology Division of the Office of the Attorney General.

5. The Following Minimum PLP Identification Methods Shall Be Utilized

At a minimum, Ecology employees, agents, or contractors shall utilize the following investigative measures, or components thereof, to determine the identity of PLPs. Note: If any of these methods were completed at an earlier stage in the process (e.g., initial investigation or SHA), there is no need to repeat these efforts unless the site manager believes new information could be obtained.

- A. A review of Ecology and local health department records for the site;
- B. Identification of property ownership through review of county property tax records; and,
- C. Interviews with the current site owner.

6. A More Extensive PLP Search May Be Appropriate In Some Cases

Under certain circumstances, a PLP search more extensive than the one listed above, may be necessary to identify PLPs. For example, the PLPs identified using the methods described in paragraph 5, above, may not be financially solvent, may not have viable insurance policies that would pay for remedial action, or may have contributed a small percentage of the contamination found at a site. In these cases, it may be necessary or appropriate to conduct a more comprehensive search to identify and notify additional PLPs. Use best professional judgment to determine the necessary depth of a PLP search.

As site conditions or circumstances of a PLP search may warrant, additional investigative measures identified in Procedure 500B may be utilized to determine the identity of PLPs. When using these measures, the investigative timeframe should be limited to that time after the release occurred, if known.

7. At A Minimum, PLPs Known To The Department And Current Owners And Operators Shall Be Notified As PLPs

Even if the Department does not intend to issue an order to or otherwise pursue a specific PLP, the site manager shall notify the following persons as PLPs:

- A. All PLPs identified during the search under paragraphs 5 and 6 above; and,

- B. Current owners and operators of the facility where a release has occurred.

8. Additional PLPs May Be Notified

The Department may notify additional PLPs at any time throughout the cleanup or cost recovery processes. Such action might be appropriate if the new PLPs are identified, PLPs willingly assume liability, or PLPs request that additional persons meeting the requirements for PLP status be sent notice.

Likely additional candidates for PLP status are:

- A. The past owners and operators who were operating the facility at the time the release was believed to have occurred;
- B. Significant generators and transporters of hazardous substances that have been released or have the potential to be released at the site;
- C. Owners and operators of nearby properties from which hazardous substances have migrated onto the subject property and contributed to the contamination; and,
- D. Others that fall within the definition of PLP, as determined by the best professional judgment of the site manager.

Whenever additional status letters are sent, the Department will also notify all persons who previously received a status letter for the facility, as to the identity of the new PLPs.

9. The Department Shall Facilitate PLP Efforts To Identify Additional PLPs

Typically, known PLPs will do the research to identify other PLPs and submit this information to the Department, along with a request to name these additional PLPs. As resources permit, the Department shall review this information and, if appropriate, issue additional PLP notice letters.

10. PLPs Shall Be Notified Of Their Potential Liability With A Preliminary Status Letter When Ecology Is Ready To Proceed With Remedial Action

The purpose of a preliminary PLP status letter is to provide a timely notice and a meaningful opportunity for comment to all persons the Department believes to be potentially liable for the site.

Due to practical considerations (i.e., site prioritization, the time and effort required for PLP searches, the need to establish credible evidence and notification procedures), a PLP shall receive notification of its suspected liability when the Department is ready to pursue remedial action at a site (other than those noted in paragraph 2, above).

11. The PLP Comment Period May Be Extended

The PLP comment period is normally thirty (30) days. The Department may extend a PLP comment period beyond this 30-day period required by the MTCA, as long as the quality or timeliness of the cleanup is not threatened.

12. PLPs May Voluntarily Waive Their Rights To Notice And Comment

By providing the Department with a written notification, persons may accept status as a PLP without the thirty (30) day notice and comment period at any time by voluntarily waiving their right to the notice and comment period. Some PLPs may choose to waive their procedural rights as part of a good-faith gesture to the Department. Waiving their initial process rights can also be beneficial to liable persons who wish to begin negotiations more quickly. When a PLP waives a right of notice and comment, it can be limited to a specific phase of the cleanup process.

13. Credible Evidence Is Required To Name A Person A PLP

MTCA requires Ecology to have credible evidence of potential liability prior to naming a person as a PLP. Persons shall be named potentially liable when credible evidence exists to support a determination of PLP status.

Evidence is considered credible when an impartial, reasonable person would determine that the evidence is believable. The credibility of evidence is based on the individual characteristics of each site.

Generally, credible evidence shall include:

A. A verification of whether a release or threatened release has occurred; examples include:

- 1) Analytical tests;
- 2) Complaints;
- 3) Observations;
- 4) Expertise or professional judgment of investigators;
- 5) Written spill or accident reports;
- 6) Video footage or photographs;
- 7) Receipts of acceptance or disposal of hazardous substances at the site.

The Ecology Division of the Office of the Attorney General shall be consulted prior to a determination to proceed without test data.

B. The evidence supports that the person is liable according to the standards of liability set forth in RCW 70.105D.040; and,

C. The Department believes the release or threatened release poses a threat to human health or the environment. For example:

- 1) The release itself or impacted media are at a concentration that exceeds cleanup levels, including standards established under applicable state and federal laws;
- 2) Available data indicates that the release appears to be at a low concentration but is suspected to exceed cleanup standards due to sampling limitations or other information available about the site;
- 3) The release is at an unknown or low concentration but is suspected to be sufficiently toxic or in a sufficient quantity to affect, has the potential to affect, or has had adverse effects on human health or the environment;

- 4) The site has characteristics or circumstances such that there is a potential for a release which poses a threat to human health and the environment.

14. PLPs Shall Be Issued A Final Determination Of Status

A PLP's final PLP status shall be determined based upon a review of any written comments received during the comment period. The final determination of a status letter shall be issued to all PLPs previously notified, informing them of Ecology's determination. If the responses to the notice letter raise questions as to whether credible evidence is available to support a finding that a person is a PLP, consult with the Ecology Division of the Office of the Attorney General prior to making a final determination.

15. Records Of The PLP Search Shall Contain The Following:

The following information, which may be collected during a PLP search, shall be placed in the site file and maintained consistent with Chapter 10 of Ecology's Policies and Procedures Manual. The following information, as appropriate, should be included:

- A. Copies of all documents (see POL 800B);
- B. Transcripts or summaries of all conversations and interviews;
- C. Copies of all inter- and intra-office memos and e-mails, early notice letters and comments, PLP letters and comments, agency findings, and personal notes;
- D. Telephone log and field notes;
- E. Financial information;
- F. Corporate information; and,
- G. Title search results.

Information shall be released to the public upon request, consistent with Ch 42.17 RCW, Ch. 173-03 WAC, and Chapter 10 of Ecology's Policies and Procedures Manual. Note that some PLP searches may be considered attorney-client work product and therefore not subject to public disclosure. Consult with the assistant attorney general assigned to the case to determine the status of the search and, if it is exempt from disclosure, make that clear in labeling of the site file.

Note: This policy is intended solely for the guidance of Ecology staff. It is not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with this policy depending on site-specific circumstances, or modify or withdraw this policy at any time.

Approved:



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Toxics Cleanup Program